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Reform of Legal Procedure: Rulemaking Power for Courts

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REFORM OF LEGAL PROCEDURE: RULE-MAKING POWER FOR COURTS‡

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Gentlemen of the Indiana Bar: Tomorrow, I understand, you will assemble in the capacity of specialists to devise, if possible, an efficacious method of treating a grave social malady. The gravity of the disease lies not so much in the intrinsic difficulty of controlling it as in the handicaps put upon men who, because of training, character and position, ought to, but do not, occupy a position of leadership in combating it. The disease with which you will deal, among other things, is legal technicality and complexity in judicial procedure, with particular reference to the statement of the cause of action. This disorder, which, for the sake of convenience I shall label procedural technicality, is a disease of the childhood of society, and like measles and whooping cough in children, it is difficult to avoid, more or less painful to the afflicted, and disagreeable to all who associate with the patient. There is, however, the comforting thought that, like our children, society emerges ultimately from this stage, through a somewhat nondescript adolescence, to maturity. It is the opportunity, as it is the duty, of the bench and bar to devote its special training and its intelligence to the great task of purging our social organism of certain parasitic growths which have always been the outstanding characteristics of simple and primitive societies.

That legal technicality is a disease, not of the old age, but of the infancy of a political state, history furnishes abundant proof. The ancient Germanic law and the more recent Anglo-Saxon jurisprudence were extremely technical. In Scandinavia of the tenth and the eleventh centuries, procedure, for example, was so technical that the omission of a word from or the misplacing of words in a formula, resulted in the defeat of a litigant and a miscarriage of justice. If you, the members of this great Bar, succeed in devising some means whereby the machinery of justice may move more smoothly and with less creaking, you will lift your state to a higher level of civilization and progress. I think I can without presumption say to you that we on the Illinois side of the line wish you well. We shall watch your progress and

‡ An address delivered to the Indiana State Bar Association at Indianapolis, Thursday, December 18, 1930.

* See biographical note, p. 398.

hope to profit by it, for we are not all so completely insulated by layer upon layer of self-complacency, through which neither the light of experience nor the fresh and stimulating breeze of discussion and debate can penetrate, as was one member of our legislature two years ago who pronounced the Illinois system so near perfection that it were useless to try and improve it!

I am informed that the program which you will consider contains two major propositions: first, respecting reform in the system of pleading; and second, a proposal to enlarge the rule making powers of the courts of your state. In the full confidence that you will hear what I say in the spirit in which it is spoken and look upon it as the plain and simple contribution which a lawyer throws into the hopper where ideas are threshed and the chaff winnowed from the wheat, I shall, with your kind indulgence, address myself to this problem. I deliberately use the singular term, for it seems that, dealt with on sound principles, the problem is single.

May I ask you to bear in mind that even if I speak in the language of dogmatism and with the air of confidence, I do so less because I feel assured or inspired, for I am neither, but more because I wish to avoid the tiresome qualifications in which modesty, especially when assumed, ostentatiously clothes its assertions. The truth is that I shall almost certainly make very few, if any, statements this evening, no matter how dogmatically they may stand forth in words, about which I have not some serious doubts. I have thought about these matters for some years; I have formed tentative opinions; but I am satisfied that in all cases my opinions may be unsound and that other views may much more closely approximate the ultimate of wisdom.

Brought up in a so-called code state, subdivision two of section 359 of your code of civil procedure has a decidedly familiar sound. I read the brief prescription which your legislature, in 1881, laid down for your complaints: "A statement of the facts constituting the cause of action in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." I suppose it is the experience of every lawyer and of every law student trained in pleading under the so-called code system to wonder why pleading often presents serious difficulties. Nothing could be simpler, seemingly, than a requirement that the facts constituting the cause of action should be stated in ordinary and concise language. The statute directs us to leave out legal

conclusions of every sort; it directs us merely to set out the essential facts which we think are at the basis of our cause of action. Mr. Pomeroy, in his valuable work on *Remedies and Remedial Rights,* interprets the codes to mean that a complaint properly drawn not only does not disclose whether the action is in tort or in contract, but that if properly drawn it should not disclose such fact. That is to say, he is of the opinion, and such was clearly the intention of the draftsmen of the Field Code for New York, that only the facts shall be set forth and the legal inferences from such facts shall be drawn by the court. Yet, I believe it is safe to say that not a single court in any Code state in the United States has put this construction upon these plain words. We have drifted so far from the real intent of the framers of the code that, as in the case of the Supreme Court of your own state, in *Mescall v. Tully,* 91 Ind. 96, at page 99, and decided only two years after the adoption of the Code, a complaint must proceed upon a definite theory and on that theory the plaintiff must succeed or not succeed at all. The pleader, the courts say, must impart a certain legal complexion to the facts, clearly contrary, as it has always seemed to me, to the intention of the framers of the Code.

The Supreme Court of your state in the later case of *Oolitic Stock Company v. Ridge,* 83 N. E. 246, decided in 1908, denied recovery to the plaintiff who proceeded in the trial court under the Employers' Liability Act, which, before the case reached the Supreme Court, was held unconstitutional, notwithstanding a paragraph in the complaint contained a complete statement of a cause of action at common law. The court held that since the complaint seemed to be drawn upon a theory of liability under the Employers' Liability Act, the action could not be sustained merely because the complaint contained sufficient facts upon which a common law liability could be grounded. It is difficult to imagine a clearer case of violence to the letter and the spirit of the law than is exemplified in the numerous decisions of your court upon this question, and some courts have realized their mistake and have departed from their early position on this point, notably the Supreme Court of Wisconsin.

It has seemed to me, however, erroneously it may be, that some gentlemen, text-writers of eminence, and some courts of high standing, who insist that the only criterion of the right to change from one theory to another should be surprise, or its absence, ignore considerations of vital, indeed, sometimes of controlling

importance. It is not enough that it cannot be fairly said that the defendant is surprised; if the effect be to deprive him of independent legal or constitutional rights and thereby, perhaps indirectly but effectively all the same, to create advantage in the plaintiff, the switch should not be permitted. The Indiana court, as well as some other courts, has not recognized this ground of distinction, valid though it seems to be. It has arbitrarily and in unqualified terms laid down the rule that the theory of the case must be consistently adhered to and that no change will be permitted although there are enough facts in the complaint which, if pieced together aright, would justify relief of some other kind or on some other theory than was in the mind of the plaintiff's counsel when the complaint was drawn. I have felt that the rule was technical, artificial and unsound, I cannot, however, unqualifiedly subscribe to the sweeping statement of Dean Clark of Yale,[1] to the effect that it is immaterial whether the plaintiff calls his action one of tort or of contract. On the contrary, it is very material in many jurisdictions, New York, for instance, upon the right of the plaintiff to obtain body execution whether his action is in tort or in contract.[2]

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1 *Code Pleading*, p. 176. West Publishing Company, 1928.

2 Reference has been made to the decision of the Supreme Court of Indiana in *Mescall v. Tully*, and to Mr. Pomeroy's statement in his *Remedies and the Remedial Rights*, section 573. With the timidity which should restrain one who speaks in circumstances not imposing the responsibility which belongs to one speaking for a court, or preparing a text for the profession, it is suggested that both the court and the learned text-writer are in error. The former takes a view which is so narrow as to be indefensible in view of the language and purpose of the code provisions; the second loses sight of certain fundamental principles which the makers of the code had no intention to disturb. The code was intended to deal with procedure. In the main, it was not intended to disturb substantive rights, or to disarrange or destroy rules of substantive law. While the demarcation between substantive and adjective law may be difficult to define, what is meant may best be explained by illustration. The right to a trial by jury in civil cases is, in some states, like Indiana, preserved in the constitution, and in all states its extent is defined by statute. That right, when of constitutional origin, cannot be taken away without waiver, express or necessarily implied, by the party entitled to it. In certain actions at law, although not generally in suits in equity, the defendant is entitled to a jury trial unless he waives it. If, therefore, as is sometimes asserted, the right to switch the theory from law to equity ought to be recognized in all cases, unless there has been actual and prejudicial surprise, the result may be to deprive the defendant of a right or privilege which the legislature has given or the constitution secured him. In the latter instance it cannot,

The Supreme Court of Indiana, as have the courts of other states, has often used language like this: "This section (359 Code of Civil Procedure) does not require more than is reasonably necessary to inform defendant fully and distinctly of what he is called upon to meet." That is to say, the courts, speaking in general terms, say to the profession, in effect, that a pleading is sufficient if it informs your adversary of what the basis of your claim against him may be. This is, in substance and effect, notice pleading; and this closely approximates the language of the Michigan Judicature Act of 1915. But what a mockery these words are when we examine the decisions and see what actually has been required by the very courts which have made these liberal phrases.

I am here on short notice, and I had no opportunity to examine your decisions in detail. We know that many courts have grossly misconceived the purpose of the code and through misinterpretation of its language and misapplication of its principles, have sent the plaintiff hence without relief because he brings an action in trespass when he should have proceeded in case[3]; that they have ejected a litigant from the temple of justice because his counsel neglected to allege some circumstance deemed necessary to a complete cause of action, but the omission of which could not possibly have misled any party interested in the cause;[4] that they have withheld justice from a litigant because he supposed that he would be able actually to prove negligence, when, in point of fact, res ipsa loquitur, and the fact of the accident actually declared the defendant's liability.[5] We know that the defendant has been mulcted, notwithstanding a meritorious defense, simply because he did not state it with sufficient fullness, deeming himself entitled to prove it under a general denial;[6] we know that many a just counterclaim has been denied simply as a penalty because some lawyer neglected to use a formula of words indicating an intention to plead it;[7] and that a party has been defeated notwithstanding he alleged all the *facts* necessary to

in the former it should not, be taken from the individual upon some vague theory of repeal or amendment by implication.

[3] *Gordon v. Ry. Co.*, 195 N. Y. 137 (1909).

[4] *Scofield v. Whitelegg*, 49 N. Y. 259; *Tooker v. Arnoux*, 76 N. Y. 397.

[5] *Orcutt v. Century Co.*, 201 Mo. 424; *Ryland v. Du Pont Co.*, 93 Kan. 288.

[6] *Cone v. Ivinson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

[7] *Regan v. Jones*, 14 N. D. 591, 105 N. W. 613 (1905); (Numerous cases in New York, Wisconsin, South Dakota, etc., have so held).

show title in himself, but failed to say that he had title.[8] A system of pleading under which occurrences of this type are common cannot be right; or if the system be right, the men who administer it cannot be competent. I do not care which horn of the dilemma we may select, there is need for reform; no system should exist which can serve as an excuse or apology for such acts of wanton injustice.

I suppose it is scarcely debatable that there are many things amiss with our system of code procedure. Too many cases involve questions of pleading; and too many decisions turn entirely upon such questions. I went hurriedly through the two latest reports of the decisions of the Supreme Court of your state, volumes 199 and 200, containing an average of nearly 700 pages. In each report, astoundingly, there were less than twenty-five civil cases; all others were criminal law decisions, and predominantly liquor prosecutions. In volume 199 over 26% of these cases involved questions of pleading; and in volume 200 the situation was almost the same, questions of pleading involving 33% of the cases. I assume that on this point, however we may disagree upon practical remedies, all are agreed that such a situation should not exist. I believe every reputable member of the Bar feels that it is in the interest of justice that technical questions of pleading be reduced to a minimum.

By actual count of cases in England during the years 1830-32, approximately one-third in certain courts involved questions of pleading; under the Hilary Rules of 1834, during the years 1846 and 1847, substantially the same situation existed, namely, one case out of three considered questions of pleading. It is a fact that although the Hilary Rules were expected to improve materially the procedure in England, the actual results were disappointing. Your own experience seems to approximate the common law and the post-Hilary Rules periods. When we come down to the English Judicature Acts, under which the procedure in the courts of England is regulated today, a different situation confronts us. The Judicature Acts were adopted in 1873 and 1874 and brought about a radical change in English rules of pleading and practice. The courts were given extensive rule making powers. During the years 1907 to 1909, under the operation of the English Judicature Acts, we find that one case in 76 involved questions of pleading. There must be an explanation

[8] *McCaughay v. Schuelt*, 117 Cal. 223.

of this contrast with our own experience, and I suspect that impartial students of the English system under the Judicature Acts would find the reason in the theory of those acts themselves and in the enlightened manner in which the judges of the English courts have administered them.

In this connection reference must be made to the experience of the Illinois Appellate Court to which come cases from the Municipal Court of Chicago. In that municipal court very liberal rules of pleading were adopted. In 135 cases examined there was a pleading question in one case out of 42, and but one reversal. In the Supreme Court of Illinois, however, out of 558 cases examined in eight volumes of reports, during a period practically contemporaneous, there was one reversal on points of pleading in 14 cases, and one case in every four dealt with pleading. A partial explanation of this condition I believe to be the simplified rules of pleading in the Municipal Court, under the able leadership of the Honorable Harry Olson, former Chief Justice. I am glad that Chicago can thus in this instance invite you to emulate her example.

The English are satisfied with their system; and the Canadian lawyers are satisfied with theirs. In Canada I know from experience as well as from the lips of the President of the Manitoba Bar Association this year, that their lawyers would not think of curtailing the extensive rule making powers of the judges. Reversals on questions of pleading under the English Judicature Acts dropped from one in 44 under the old common law and one in 33 under the Hilary Rules, to one in 605. There must be a reason. For a large number of jurisdictions in the United States there is one reversal in every twenty cases on points of pleading.

The Michigan experience is sufficiently interesting to deserve more extended notice. In 1915 that state adopted a Judicature Act. The adoption of the law was in some points a radical departure. It was provided that no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend. This is virtually an adoption of notice pleading. It is still open to counsel to draw their pleading, apparently either in the common law or in the code form, but in no event is a court to reject a pleading as insufficient if a person is reasonably informed of the nature of the claim against him. Again, demurrers, pleas in abatement and pleas to the jurisdiction were

abolished. All questions, since the adoption of the Act, are raised either by motion to dismiss, in the answer, or simply by a notice attached to the plea. When the questions are raised by answer or by notice the court determines them in advance of trial upon four days' notice to either party. The party may amend, before or after hearing, upon such terms as the court may impose.

I examined case by case the decisions in volume 247 of the Michigan Supreme Court reports, consisting of 700 pages. I found approximately 144 civil cases which had been before the court; in only seven of these had any question of pleading been raised; that is to say, one case in 20 had a pleading question in it in the Michigan Supreme Court, whereas in volume 200 of your state reports, approximately one case in three discussed a question of pleading. I am not sure what the explanation is. It is probable that the attitude of the court has something to do with it. At any rate, I would not attribute this striking disparity to superior attainments of Michigan lawyers in the art of pleading. I suspect that the liberal and simple provisions under the Judicature Act of 1915, to which I have adverted, are the true explanation.

Some of us have grown accustomed to thinking that the code was an improvement upon common law pleading. I find it difficult to give up this pet notion. The fact is I am convinced, almost against my will, after consideration of our experience under the code as compared with the common law system, that the improvement has been so slight as to be quite negligible. For example, in the matter of reversals on questions of pleading the common law states, at least according to one statistical examination, average one in 21, whereas the code states average one in 20. In affirmances the common law states average one in six, the code states one in seven. It does not seem that the code has materially reduced the number of cases which are decided on pleadings. It has not, at any rate, effected any substantial reduction, such as we have seen took place under the English Judicature Acts. The code has not, by this test, operated to lessen delay in litigation or prevent disproportionate expenditure of time by the courts upon the lesser essentials of judicial administration. The time has come for the members of the Bar to examine critically the actual operation of the code system. It has been on trial long enough to enable us to make a just and critical appraisal of its merits.

I have already referred to the working of the code system in several instances. It is noticeable that certain states have a comparatively excellent record as far as reversals on questions of pleading are concerned. For example, the state of Massachusetts, in a recent survey, reversed only one case in 92 on points of pleading. The Supreme Judicial Court of Massachusetts has made it known and has for many years consistently adhered to the policy that it will avoid decisions on questions of pleading in all possible circumstances, thereby discouraging the raising of technical questions of that type. In Wisconsin the same situation has been developing in recent years, and the record of that state is unusual. All of which, members of the Bar, after all indicates that any system, including both the code and the common law systems, may be satisfactorily administered in the hands of capable, conscientious and forward-looking judges. And the best, the simplest system the human brain can devise, will be imperfectly and badly operated by incompetent and narrow-visioned judges.

To speak of code pleading as a simple system I think is a euphemism. Consider for a moment the voluminous works on this system. There are Sutherland, Pomeroy, Bliss, Maxwell, Elliott, to mention only a few of the very large number of bulky works upon the law of code pleading. Look at *Corpus Juris,* volume 49, with its almost 900 pages, large and in fine print, on the subject of pleading, much of which concerns itself with pleading under statutes and under the codes. On the contrary, it has become tremendously and almost hopelessly complex and complicated. It is very probable that any system which may be devised will, in the course of fifty years, become so loaded down with judicial decisions and interpretations that a new order will have to be brought forth. I suppose it is humanly impossible to avoid the complexity which necessarily, it seems, under our system of binding precedent, follows a long period of judicial interpretation. The English volume of Rules under the Judicature Acts consists now of about 3,000 pages. All cannot be simplicity where there are so many words. The courts should hold questions of pleading down to a minimum and not discuss them whenever it can be avoided.

In closing this part of the discussion let me suggest that permanent simplicity in pleading is an irridescent dream, so long as courts feel themselves bound by every prior decision on a

point of pleading. You lawyers do not help the court to shake off the paralyzing hand of precedent in the field of adjective law, even when the judges are so minded. If you find some technical flaw in your adversary's pleading, you urge it upon the court; and if the court ignores your technicality or holds against you contrary to some dusty precedent, you file a petition for a rehearing or re-argument in which you emphatically remind the judges and they must *follow* the law, or be damned ever after. It takes more courage than average human nature has for the court to stand against that sort of pressure. Once the mistake has been made, there is little choice but go on; like Macbeth, the court having "stepped in so far, that should I wade no more, returning were as tedious as to go o'er." I have been on both sides of the bar; I have been guilty as you have been of pressing a technical precedent; and I have found it easier to wade on than to return. The fact is that the system itself compels lawyers to resort to these technicalities or else be charged with remissness towards their clients.

I fear that do what you will, pleading and procedural reform cannot accomplish all some of us expect of it. There is a deadline beyond which the best and simplest system is helpless. No scheme you devise will absolve the lawyer from the duty of being public spirited, the judge from the obligation to look to the reason of the law as well as to its forms, and the pleader, last but not least, from the uncompromising necessity of clear thinking and lucid statement. The clear thinker is a rare human phenomenon; to him no system of pleading will offer serious difficulties. It is of the other type, less favored of nature, that the law-giver must think; his name is legion; and for him the opportunity to make fatal pleading blunders must be reduced and held down.

I suppose that one may justly class among the major activities of the members of the American Bar the attempt to put control of procedure in the hands of the judiciary. The dissatisfaction existing throughout the country with judicial procedure is not limited to the laity; it is manifest on every occasion where lawyers foregather. Unfortunately the laity puts the responsibility for this condition upon the Bar; and yet the members of the Bar are forced to practice their profession in conformity with rules with the making of which they have had little to do. If it be true, as it is sometimes justly asserted, that the trial of a lawsuit

is in the nature of a game of skill in which technicalities are the weapons and the contestants are lawyers, the fault is not wholly our own. We are required to practice our profession in a ring, if you please, constructed by the state itself; in conformity with archaic and absurd rules which the state itself has arbitrarily laid down; and with consequences resulting from failure to obey the rules which the state has expressly or impliedly defined. It is a consciousness of the irksome injustice of this situation that has led the membership of the Bar to exert strenuous efforts to have legislative bodies confer upon the courts the rule making power.

It is a striking commentary upon the inefficiency of the state itself that it should entrust to non-experts, largely laymen, the power to make the rules under which justice is administered, rather than put that technical task on persons skilled in legal science. The public, through the legislature, tenaciously retains the power to make the rules of practice and procedure in the courts; and then, with brutal injustice and insincerity, holds the bench and bar responsible for the flagrant abuses which from time to time transpire in connection with the administration of justice. In no other profession do we have such a situation. In medicine, in engineering, in accountancy, the experts, the members themselves, are free to conduct their business and their professions in keeping with rules of their own making best calculated to make them the most efficient instruments of public service. Not so the legal profession. In his essence and true character a public servant, with definite public duties and responsibilities to a greater degree than any other class of citizens, the lawyer, whether on the bench or at the bar, is bound hand and foot by regulations which he cannot modify, no matter how absurd, archaic or impracticable they may be. In popular conception the entire duty and responsibility for the administration of justice, civil and criminal, in this state and in this country, is put upon the bench and the bar; whenever miscarriages occur the public unequivocally puts the blame upon the lawyers and upon the courts. And yet the bald truth is that in a great many, if not in the majority of instances where flagrant miscarriages of justice take place, the fault lies, not wholly with the courts, not wholly with the lawyers, not wholly with both, but largely with the rules under which courts and lawyers are forced to work. It is my firm conviction that bench and bar can engage in

no more serious and no more important enterprise, can have no worthier aspiration, than to free itself from the thralldom of rules thrust upon it by unskilled men without knowledge of or experience in the law.

It is not without significance that in the judgment of every responsible and competent observer who sees the English system in operation, it works more efficiently than ours. It is not because Englishmen are smarter than Americans; it is not because there is greater talent at the bar, or on the bench; it is not because Englishmen have a superior genius for government and administration than we have; it is, in my humble judgment, because, in the entire history of English jurisprudence, the control of the courts over the administration of justice has never been surrendered or wholly lost. The public there, as here, holds the courts responsible, but there, and not here, the courts and the lawyers have it in their power to change the rules so as to make them instruments rather than impediments in the administration of justice.

Why is it that in the last twenty-five years in the United States and in every state of the Union there have grown up quasi-judicial and administrative tribunals outside the courts to which have been transferred important judicial functions? I refer to the various administrative boards and commissions which have sprung up like mushrooms all over the land. It is, I believe, partly due to the fact that the public has lost confidence in the courts and in the bar and in the capacity of both to administer justice effectively. The public, however, with the supreme confidence and the short-sightedness of democracy, failed to break the chains which bind the courts and the lawyers; it created new tribunals in the vague hope that the evils would be corrected. And is it not paradoxical that these extra judicial growths all have the power to prescribe rules of procedure to a much greater extent than the regular courts!

I do not wish to be understood as exonerating the courts and the lawyers from all blame for the many blemishes upon the face of American justice; but I do wish emphatically to put a large share of the responsibility where it justly belongs, on the legislature itself, which with a tenacity more stubborn than enlightened, has insisted on keeping control where it had no capacity to control, and in depriving experts of the right to control, where responsibility nevertheless was exacted. The American Con-

gress, in every instance in the last eighty years, when it has cre ated a court or a tribunal, has given that body the power to make its own rules of procedure and of practice. The Illinois legislature gave the rule making power to the Supreme Court in 1826, but unfortunately the Court did not see its opportunity and took no firm action, and the power was withdrawn in 1829. Since 1910 the bar association of Illinois has been endeavoring to persuade the legislature to grant such power to the courts. The courts are the ultimate repositories of justice and they should be freed from the shackles which prevent them from performing the function expected of them.

Under the British Judicature Act which went into effect in 1875 a few rules were laid down. The significant provision in the act, however, was that which created a committee on rules composed of eight judges and four lawyers. This committee may modify almost any feature of English procedure, upon giving notice specified in the act, which I believe is forty days. Parliament—that almost omnipotent thing in the English constitutional system—may modify or abrogate these rules, but it has not in one single instance interfered or attempted to exercise this power. I have been informed in conversations with members of the bars of England and of Canada that the operation of the system is successful. It is satisfactory, it seems, or somebody in or out of Parliament would have initiated steps to modify it.

Why is it that the Englishmen, aristocracy, capitalist and laborers alike, have such confidence in bench and bar, whereas our democracy seems to distrust both? Why is it that the states are slow to follow the example of the federal government in the field of equity as well as in all tribunals adopted in the last eighty years, where the rule making power has been given and satisfactorily exercised? I am not aware that there is any movement in any responsible quarter to change the situation and to deprive the federal courts of their rule making power. It is true Congress has refused to give the Supreme Court the power to make rules in law cases. This, however, is based upon the argument of Senator Walsh of Montana which has no application when the question is as to the advisability of giving the Supreme Court of a state the power to make rules. Senator Walsh objects principally on the ground, as I understand, that if the Supreme Court be given the power to make rules in cases at law, there will result a divergence in the practice in the federal courts and in the state courts.

In 1927 the legislature of Delaware passed an act giving full and complete power to the courts of that state to prescribe rules of practice, pleading and procedure. The statute is very simple, and I commend it to the consideration of those who are interested in this aspect of the matter. The power is given to the Chief Justice and to the associate judges of the state of Delaware. After the passage of the act the President of the Delaware State Bar Association, the late Mr. Josiah Marvel, appointed a committee of the bar to assist the court in preparing proposed rules. The bar committee prepared two drafts of rules and submitted these to various law schools throughout the country for criticism and examination. Thereafter a third draft was prepared and possibly others. The judges at all times kept in close touch with the work, but please observe that they cheerfully turned over the task of preparing the draft and of considering the principles on which the rules should be made, to a competent committee of the Bar Association. This is what would happen in most cases, and it should be so. The court would gladly accept, and should invite, if not offered, the cooperation of the Bar Association in the tremendously important task of drafting rules. The result would be a set of rules concerning the administration of justice prepared in cooperation by the judges and the lawyers. For the operation of a system under these rules bench and bar should and would with propriety be held responsible.

You are about to face the real test of greatness. A system concerning which there is so widespread complaint from the leaders of the bench and the bar, is presumptively faulty. Will you be great enough in soul, broad enough in outlook, discerning enough in intellect, and endowed sufficiently with the spirit of compromise and accommodation, so that you can agree upon some efficacious plan of action? Lawyers may be able to agree to find fault, but we find it difficult to agree on the remedy. Success in accomplishing a real improvement is difficult at best, but in the face of a substantially divided bar the case is quite hopeless. There is an opportunity for some able lawyer to identify himself with a sound movement for reform, to lead in an effort to make his state an example where justice is plainly, promptly and easily accomplished, and to win for himself the just fame of Bentham and Romilly in England. The situation is a call to duty and a challenge to the capacity of your bar for real leadership.

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